

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

STEVEN M. KINFORD,

Petitioner,

v.

BRIAN E. WILLIAMS, *et al.*,

Respondents.

Case No. 3:12-cv-00489-MMD-CLB

ORDER

I. SUMMARY

Petitioner Steven Kinford filed a second amended petition for writ of *habeas corpus*. (ECF No. 84 (“Second Amended Petition”).) Before the Court is Respondents’ motion to dismiss. (ECF No. 92 (“Motion”).) Kinford opposes the Motion. (ECF No. 95.) Respondents filed a reply. (ECF No. 103 (“Reply”).) For the reasons discussed below, the Motion is granted in part and denied in part.

II. BACKGROUND

A. Conviction and Direct Appeal

Kinford challenges a conviction and sentence imposed by the Third Judicial District Court for Lyon County (“state court”).¹ Pursuant to a guilty plea agreement, Kinford pled guilty to the crime of lewdness with a child under 14 years old. (ECF No. 48-24.) On August 27, 2008, the state court entered a judgment of conviction sentencing him to a life term with a minimum parole eligibility of 10 years, along with lifetime supervision. (ECF No. 48-28.)

Kinford filed a direct appeal and appellate attorney Jacob Sommer was appointed. (ECF Nos. 48-30, 48-41.) After discussing potential claims with Sommer, Kinford filed a

¹See *State v. Kinford*, Case No. CR6913.

notice of withdrawal of appeal.² (ECF No. 48-50.) On August 10, 2009, the Nevada Supreme Court dismissed the appeal. (ECF No. 48-56.)

B. First State Post-Conviction Proceedings

On August 6, 2009, Kinford filed a state petition for writ of *habeas corpus* seeking post-conviction relief. (ECF No. 48-55 (“First State Petition”).) Kinford also filed a motion for appointment of counsel. (ECF No. 48-54.) Post-conviction attorney Robert Fry was appointed to represent Kinford. (ECF No. 48-58). Following an evidentiary hearing and oral argument, the First State Petition was denied.³ (ECF Nos. 49-16, 49-23.)

Kinford filed a post-conviction appeal with the help of post-conviction appellate attorney Erik Johnson. (ECF No. 49-31 (“First Post-Conviction Appeal”).) Kinford raised three issues on appeal:

1. Is a guilty plea valid when [Kinford] was told by the district judge that if [Kinford] pleads guilty, he is facing 10 years to life but if he refuses, he is “looking at 50 years minimum” and “if [Kinford] didn’t make a decision

²Sommer wrote a note in Kinford’s file stating that Sommer was “unable to find any good faith basis upon which to file an appeal.” (ECF No. 52-32.) Sommer advised Kinford to dismiss the appeal and pursue post-conviction relief instead, and Kinford agreed. (*Id.*)

³The First State Petition and supplements raised a total of seven grounds:

Ground I: Ineffective assistance of counsel (“IAC”) and lack of due process at the plea-bargaining stage and plea agreement. Trial counsel failed to advise Kinford regarding potential sentence and coerced Kinford into taking a plea deal.

Ground II: Lack of due process and IAC for permitting the change of plea and sentencing to take place while Kinford was heavily medicated.

Ground III: Lack of due process and IAC by requiring Kinford to plead guilty to an event he cannot remember due to traumatic brain injury.

Ground IV: Lack of due process at sentencing and IAC for incorrectly advising Kinford regarding the potential sentence and failing to move to withdraw the guilty plea that was based on erroneous information.

Ground V: IAC for failing to perform proper discovery or file any pretrial motions or evidentiary motions regarding exculpatory audio tapes.

Ground VI: IAC and lack of due process for failure to use the Nevada statute in effect at the time of the commission of the crime.

Ground VII: Under the totality of the circumstances, Kinford’s guilty plea was not properly entered and did not comport with due process.

(ECF Nos. 48-55, 48-63, 49-8).

1 today. [*sic*] [the judge was] going to make one, okay?"

2 2. Is trial counsel ineffective for agreeing with the guilty plea so obtained?

3 3. Is appellate [attorney] ineffective for withdrawing the direct appeal?

4 (*Id.* at 5.) The Nevada Supreme Court affirmed the denial of relief on the first and second
5 issues but declined to address the third issue because it was not raised before the state
6 court. (ECF No. 49-41.) A remittitur issued on November 4, 2011. (ECF No. 49-49.)

7 **C. Second State Post-Conviction Proceedings**

8 In December 2011, Kinford filed a second state petition for writ of *habeas corpus*.
9 (ECF No. 49-51 ("Second State Petition").)⁴ The State moved for dismissal, and the
10 Second State Petition was dismissed as procedurally barred. (ECF Nos. 49-58, 50.)

11 Kinford appealed (ECF No. 50-7 ("Second Post-Conviction Appeal")).⁵ The
12 Nevada Supreme Court affirmed in December 2012, finding that the Second State
13 Petition was both untimely and successive under NRS § 34.726(1) and NRS § 34.810(2),
14 and thus procedurally barred as Kinford failed to demonstrate good cause and actual

15
16 ⁴The Second State Petition raised four grounds:

17 *Ground One:* IAC for conspiring with the State to withhold exculpatory
18 evidence that the victim's father was also accused of molesting the victim
and audio tapes containing a confession by Kinford's ex-wife that she put
the victim up to bringing the charges against Kinford.

19 *Ground Two:* IAC for conspiring with the State to threaten or coerce Kinford
20 into signing a plea agreement.

21 *Ground Three:* Lack of due process because prosecutors withheld
exculpatory evidence that the victim's father was the molester, proving
Kinford's innocence.

22 *Ground Four:* IAC for allowing the State to secure an unconstitutionally
23 severe sentence for kissing a 12-year-old girl.

24 (ECF No. 49-51, *see also* ECF No. 25-16 (earlier filed and more legible version of Second
State Petition).) Kinford indicated on the form that he had previously filed a petition
challenging his conviction and attached a copy of the First State Petition and supplements
25 as "Exhibit 1." (ECF No. 49-51 at 6, 20-56.)

26
27 ⁵Kinford filed a *pro se* motion for withdrawal of guilty plea in May 2012 while the
Second Post-Conviction Appeal was pending, and amended the motion multiple times.
28 (ECF Nos. 50-15, 50-28, 50-33, 53-1.) The state court denied Kinford's request in July
2013. (ECF No. 53-6.) Kinford did not appeal.

1 prejudice. (ECF No. 50-25.)

2 **D. Federal Habeas Action**

3 On September 7, 2012, Kinford mailed, or handed to a prison official for the
4 purpose of mailing, the *pro se* petition for writ of *habeas corpus* (ECF No. 10 (“Original
5 Petition”)) initiating this federal case. Kinford raised two grounds for relief:

6 *Ground One:* Kinford was denied due process of law as guaranteed by the
7 Fifth and Fourteenth Amendments based on entry of an unknowing,
unintelligent, and involuntary guilty plea.

8 *Ground Two:* Kinford’s decision to enter an *Alford*⁶ plea was based upon
9 ineffective assistance of counsel.

10 (*Id.* 12-16.) Respondents moved to dismiss, arguing the Original Petition was
11 unexhausted and procedurally barred. (ECF No. 20.) The Court denied Respondents’
12 motion, construed Kinford’s question as a motion for appointment of counsel, appointed
13 the Federal Public Defender, and granted Kinford leave to amend. (ECF No. 40.)

14 Kinford filed a counseled First Amended Petition (ECF No. 47) in September
15 2014.⁷ Respondents moved to dismiss claims in the First Amended Petition as untimely,
16 unexhausted, procedurally barred, and/or non-cognizable. (ECF No. 56.) Kinford
17 opposed the dismissal motion and moved for a stay and abeyance. (ECF Nos. 59, 61.)

18 ⁶See *North Carolina v. Alford*, 400 U.S. 25 (1970).

19
20 ⁷The First Amended Petition alleged four grounds for relief under the Fifth, Sixth,
and Fourteenth Amendments of the U.S. Constitution:

21 *Ground One:* Kinford’s trial lawyers had undisclosed conflicts of interest that
22 adversely affected their representation of Kinford, in violation of Kinford’s
right to effective assistance of counsel.

23 *Ground Two:* Kinford’s guilty plea was not entered knowingly, intelligently,
and voluntarily, in violation of his right to due process of law.

24 *Ground Three:* Kinford’s plea, and his inability to withdraw that plea,
25 resulted from the ineffective assistance of his appointed trial counsel, in
violation of his right to the effective assistance of counsel.

26 *Ground Four:* Kinford’s appellate attorney was ineffective for advising
27 Kinford to abandon his direct appeal, depriving him of the ability to raise
meritorious claims for relief, in violation of his right to due process the
effective assistance of counsel.

28 (ECF No. 47.)

1 The Court granted Kinford's motion, staying this action pending exhaustion of his claims
 2 in state court, and denied Respondents' dismissal motion without prejudice. (ECF No.
 3 75.)

4 **E. Third State Post-Conviction Proceedings**

5 On October 9, 2014, Kinford filed a third state petition for writ of *habeas corpus*
 6 (ECF No. 85-7 ("Third State Petition")) through federal counsel.⁸ The State moved to
 7 dismiss, and Kinford opposed the motion. (ECF Nos. 85-10, 85-11.) The state court held
 8 the Third State Petition was procedurally barred, but Kinford might be able to show good
 9 cause to overcome the procedural bars as to his IAC claim alleging his trial lawyers had
 10 undisclosed conflicts of interest adversely affecting their representation of Kinford
 11 ("Conflicts IAC Claim"). (ECF No. 85-16.) The court ordered an evidentiary hearing on the
 12 Conflicts IAC Claim and dismissed the three other grounds. (*Id.*) Following the April 2017
 13 evidentiary hearing, the Conflicts IAC Claim was denied. (ECF Nos. 85-18, 86-4.)

14 Kinford appealed the adverse ruling on the Conflicts IAC Claim. (ECF No. 86-7
 15 ("Third Post-Conviction Appeal").) In April 2019, the Nevada Supreme Court affirmed the
 16 state court's finding that the Third State Petition was procedurally barred under NRS §
 17 34.726(1) and NRS § 34.810(2) and that Kinford did not show good cause to excuse the
 18 procedural bars. (ECF No. 86-10.) The Nevada Supreme Court thus concluded that the
 19 state court did not err in denying post-conviction relief. (*Id.*)

20 **F. Reopened Federal Habeas Action**

21 In May 2019, the Court granted Kinford's unopposed request to reopen this case
 22 and set a schedule to complete briefing. (ECF Nos. 79-81.) Pursuant to the parties'
 23 stipulation, Kinford received leave to further amend his pleading. (ECF No. 83.) Kinford
 24 filed the Second Amended Petition (ECF No. 84) in August 2019, alleging four grounds
 25 for relief under the Fifth, Sixth, and Fourteenth Amendments:

26 *Claim 1:* Kinford's trial lawyers had undisclosed conflicts of interest that
 27 adversely affected their representation of Kinford, in violation of his right to

28 ⁸The Third State Petition alleged virtually identical grounds as the First Amended
 Petition. (*Compare* ECF Nos. 47 and 85-7.)

the effective assistance of counsel.

Claim 2: Kinford's guilty plea was not entered knowingly, intelligently, and voluntarily, in violation of his right to due process of law.

A. Kinford did not understand the consequences of his plea.

B. The judge coerced Kinford to enter his plea.

C. Kinford's medical issues prevented him from understanding the plea.

Claim 3: Kinford's plea, and his inability to withdraw that plea, resulted from the ineffective assistance of his appointed attorneys, in violation of his right to the effective assistance of counsel.

A. Kinford's attorneys failed to effectively investigate the case or advise Kinford about his potential defense.

B. Kinford's lawyer grossly misadvised him about the consequences of his plea and a potential trial.

C. Kinford's attorney failed to object to or remedy the judge's coercion prior to the plea.

D. Kinford's attorney failed to ensure that his client entered a voluntary plea given the health issues that he knew about, or should have known about.

E. Kinford's attorneys deprived his client of the opportunity to seek withdrawal of his plea before sentencing.

Claim 4: Kinford's appellate attorney was ineffective for advising Kinford to abandon his direct appeal, depriving him of the ability to raise meritorious claims for relief, in violation of his right to due process the effective assistance of counsel.

(*Id.* at 15-58.) Kinford raised virtually identical grounds for relief in the First Amended Petition (ECF No. 47), Third State Petition (ECF No. 85-7), and Second Amended Petition (ECF No. 84), but each pleading provides different exhaustion information. The Second Amended Petition provides extensive additional allegations based on the April 2017 evidentiary hearing before the state court as well as other information uncovered by the Federal Public Defender.

Respondents' Motion repeats their previous request for dismissal of certain claims in the Second Amended Petition as untimely, non-cognizable, unexhausted, and procedurally defaulted. (ECF No. 92.)

III. TIMELINESS

Respondents argue that Claims 1, 2(A), 3(A), 3(B), 3(E), and 4 are untimely. The Court will address Claims 1 and 3(A) in relation to procedural default. See *Cooper v.*

1 *Neven*, 641 F.3d 322, 327-28 (9th Cir. 2011) (stating that when a particular issue is
2 dispositive, a district court “need not consider alternative reasons for dismissing the
3 petition.”).

4 **A. Governing Law**

5 The Antiterrorism and Effective Death Penalty Act (AEDPA) establishes a one-
6 year statute of limitations for incarcerated individuals to file a federal habeas petition. See
7 28 U.S.C. § 2244(d)(1)(A). The AEDPA limitations period is tolled while a “properly filed
8 application” for post-conviction relief is pending before a state court. *Id.* § 2244(d)(2). But
9 a pending federal habeas petition does not statutorily toll the AEDPA deadline. See
10 *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (internal quotes omitted) (holding that
11 “an application for federal habeas corpus review is not an application for State post-
12 conviction or other collateral review . . . therefore [does] not toll the limitation period”).

13 The parties agree that Kinford’s Original Petition was timely but his Second
14 Amended Petition was not. Thus, Kinford’s new claims must relate back to his Original
15 Petition to be deemed timely.

16 In habeas proceedings, when a petitioner alleges a new claim in an amended
17 petition filed after the expiration of the AEDPA deadline, the new claim will be considered
18 timely only if it relates back to a claim in a timely-filed petition. See *Mayle v. Felix*, 545
19 U.S. 644 (2005). Although Rule 8 of the Federal Rules of Civil Procedure “requires only
20 ‘a short and plain statement of the claim’” in ordinary civil cases, Rule 2 of the Rules
21 Governing Section 2254 Cases “requires a more detailed statement” in habeas cases as
22 it “instructs the petitioner to ‘specify all the grounds for relief available to [him]’ and to
23 ‘state the facts supporting each ground.’”⁹ *Id.* at 649 (alteration in original) (citing Fed. R.
24 Civ. P. 8(a); Habeas R. 2(c)). Congress has authorized amendments to habeas petitions
25 as provided in the Civil Rules. *Id.* (citing 28 U.S.C. § 2242). Under Civil Rule 15, an

26 ⁹The use of “Civil Rule” or “Civil Rules” in this order points to the Federal Rules of
27 Civil Procedure while a “Habeas Rule” refers to the Rules Governing Section 2254 Cases
28 in the United States District Courts.

1 untimely amendment properly “relates back to the date of the original pleading” as long
 2 as it arises out of the same “conduct, transaction, or occurrence.” Fed. R. Civ. P. 15(c).
 3 For habeas petitions, “relation back depends on the existence of a common core of
 4 operative facts uniting the original and newly asserted claims.” *Mayle*, 545 U.S. at 659
 5 (internal quotes omitted). New claims in an amended habeas petition do not arise out of
 6 “the same conduct, transaction or occurrence” as prior claims merely because they
 7 challenge the same trial, conviction, or sentence. *Id.* at 652. Rather, to properly relate
 8 back, a new claim must arise from the same collection of facts alleged in the earlier
 9 petition. *Id.* An amended petition “does not relate back (and thereby escape AEDPA’s
 10 one-year time limit) when it asserts a new ground for relief supported by facts that differ
 11 in both time and type” from those alleged in the timely petition. *Id.* at 650.¹⁰

12 **B. Claims 2(A) and 3(B)**

13 Claim 2(A) alleges that Kinford did not enter the guilty plea knowingly, intelligently,
 14 and voluntarily because his attorney falsely advised that he could receive a sentence of
 15 10-25 years, instead of a mandatory life sentence with the possibility of parole after 10
 16 years. (ECF No. 84 at 48-49.) In Claim 3(B), Kinford brings an IAC claim based on the
 17 same facts as Claim 2(A). (*Id.* at 56.)

18 Respondents argue Claims 2(A) and 3(B) do not relate back because the Original
 19 Petition did not allege that trial counsel misrepresented or misstated the possible
 20 sentence rendering the plea invalid, and thus these claims arise from a new and different
 21 core of operative facts. (ECF No. 92 at 9.) Kinford points out that Claims 2(A) and 3(B)
 22 allege the same legal theories as the Original Petition—due process and IAC claims—
 23 and only provide more specific facts to show why Kinford did not understand the plea and
 24 why the attorney failed Kinford. (ECF No. 95 at 11-12.) The Court agrees. The Original
 25 Petition specifically alleged that Kinford’s plea was involuntary because he “did not desire
 26

27 ¹⁰See also *Schneider v. McDaniel*, 674 F.3d 1144, 1151 (9th Cir. 2012) (holding
 28 that one shared fact in two divergent legal theories was “not sufficient to conclude that
 they arise out of a common core of operative facts.”).

1 to enter a guilty plea to an offense that resulted in a mandatory life sentence” (ECF No. 10
 2 at 12), and Kinford’s decision to enter an *Alford* plea was based on “erroneous advice”
 3 and “ineffective assistance of counsel.” (*Id.* at 12, 15.) Implicit within Kinford’s *pro se* claim
 4 is the allegation that his attorney misrepresented or misstated the potential sentence,
 5 rendering Kinford’s guilty plea invalid. Claims 2(A) and 3(B) relate back to the Original
 6 Petition and are thus timely.

7 **C. Claim 3(E)**

8 Claim 3(E) brings an IAC claim asserting Kinford’s trial counsel purportedly
 9 deprived Kinford of the opportunity to seek withdrawal of his plea before sentencing. (ECF
 10 No. 84 at 58-59.) Kinford alleges that trial counsel could have remedied the judge’s
 11 coercion by litigating a motion to withdraw the plea, but they failed to do so because they
 12 had conflicts of interest and mishandled the case. (*Id.*) Kinford specifies that Claim 3(E)
 13 is based on Claim 2(B),¹¹ which alleges that the judge coerced Kinford into pleading guilty.
 14 (*Id.* at 49-52.)

15 Respondents argue Claim 3(E) does not relate back because the Original Petition
 16 did not allege mishandling of the case or a conflict of interest that required an independent
 17 attorney. (ECF No. 92 at 9-10.) Kinford counters that Claim 3(E)’s allegations do not differ
 18 in time and type since his attempt to withdraw the plea and secure a new attorney were
 19 included in the Original Petition. (ECF No. 95 at 13 (citing ECF No. 10 at 10-12).)

20 Applying the liberal construction accorded to *pro se* filings under the governing law
 21 to the fullest possible extent, the Court is persuaded that Claim 3(E) relates back to the
 22 Original Petition. The IAC claim in Claim 3(E) and the due process claim in Ground One
 23 of the Original Petition are tied to the same core of operative facts—Kinford was allegedly
 24 coerced into pleading guilty by the judge and Kinford’s own trial counsel, and later sought
 25 to withdraw the plea and appoint a new attorney, but counsel did not advance Kinford’s
 26 *pro se* motion to remedy the coercion prior to sentencing. (ECF No. 10 at 10-12.) The IAC
 27 claim in Claim 3(E) presents a different legal theory tied to this same core of operative

28 ¹¹Respondents do not challenge the timeliness of Ground 2(B).

1 facts. Accordingly, Claim 3(E) is timely.

2 **D. Claim 4**

3 Claim 4 raises an IAC claim based on the appellate attorney's advice to Kinford to
 4 abandon the direct appeal. (ECF No. 84 at 60-62.) Claim 4 points to evidence in the
 5 record that Kinford's plea was invalid; specifically, that he was misadvised as to the
 6 potential sentence, the judge improperly coerced him, and Kinford's medical issues
 7 interfered with his ability to enter a voluntary plea. (*Id.* (referencing Claims 2(A), 2(B), and
 8 2(C)).) These allegations are tied to a common core of operative facts as Ground One of
 9 the Original Petition, which alleged a due process claim based on his medical issues and
 10 judicial coercion. See, e.g., *Nguyen v. Curry*, 736 F.3d 1287, 1297 (9th Cir. 2013)
 11 (permitting relation back based on a common core of facts). Claim 4 is therefore timely.

12 **IV. COGNIZABILITY**

13 Respondents move to dismiss Claims 1 (in part) and 3(A) arguing that such claims
 14 are not cognizable in federal habeas under *Tollett v. Henderson*, 411 U.S. 258 (1973),
 15 because the claims allege pre-plea errors. (ECF No. 92 at 16-17.)

16 In *Tollett*, the Supreme Court held, "[w]hen a criminal defendant has solemnly
 17 admitted in open court that he is in fact guilty of the offense with which he is charged, he
 18 may not thereafter raise independent claims relating to the deprivation of constitutional
 19 rights that occurred prior to the entry of the guilty plea." 411 U.S. at 267. Thus, "[a]s a
 20 general rule, one who voluntarily and intelligently pleads guilty to a criminal charge may
 21 not subsequently seek federal habeas relief on the basis of pre-plea constitutional
 22 violations." *Hudson v. Moran*, 760 F.2d 1027, 1029-30 (9th Cir. 1985).

23 However, *Tollett* does not bar all post-conviction claims alleging pre-plea
 24 violations. A criminal defendant who pled guilty (or no contest) may "attack the voluntary
 25 and intelligent character of the guilty plea." *Tollett*, 411 U.S. at 267. This is done by
 26 showing that the advice defendant received from counsel was not within the range of
 27 competence demanded of attorneys in criminal cases. See *McMann v. Richardson*, 397
 28 U.S. 759, 770-71 (1970). "*Tollett* . . . provides that although freestanding constitutional

claims are unavailable to habeas petitioners who plead guilty, claims of pre-plea ineffective assistance of counsel are cognizable on federal habeas review when the action, or inaction, of counsel prevents petitioner from making an informed choice whether to plead.” *Mahrt v. Beard*, 849 F.3d 1164, 1170-71 (9th Cir. 2017) (rejecting state’s argument that *Tollett* barred IAC claim for failure to file suppression motion because such motion did not involve advice concerning the guilty plea itself).

Tollett is inapplicable here as both Claims 1 (in part) and 3(A) attack the voluntary and intelligent character of Kinford’s guilty plea by alleging that counsel’s ineffective assistance prevented Kinford from making an informed choice of whether to plead guilty. Claim 1 alleges all three of Kinford’s trial counsel previously represented the victim’s father, who was also accused of molesting the victim. (ECF No. 84 at 19-47.) Kinford alleges that counsel’s failure to disclose their conflict of interest adversely affected their representation of Kinford because, among other things, counsel ignored Kinford’s *pro se* motion to withdraw the guilty plea. (*Id.*) Additionally, Claim 3(A) contends that counsel’s undisclosed conflicts also prevented them from effectively investigating the case or advising Kinford about a potential defense. (*Id.* at 54-56.) These claims sufficiently allege counsel’s actions or inaction prevented Kinford from making an informed decision on whether to plead. Thus, Claims 1 (in part) and 3(A) are cognizable. *See Tollett*, 411 U.S. at 267-69; *Mahrt*, 849 F.3d at 1170-71.

V. EXHAUSTION

A. Governing Law

Pursuant to 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court remedies on a claim before presenting that claim to the federal courts. *See* 28 U.S.C. § 2254(b)(1)(A). This exhaustion requirement ensures that state courts, as a matter of comity, will have the first opportunity to address and correct alleged violations of federal constitutional guarantees. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 731 (1991). “A petitioner has exhausted his [or her] federal claims when he [or she] has fully and fairly presented them to the state courts.” *Woods v. Sinclair*, 764 F.3d 1109, 1129

(9th Cir. 2014) (citing *O’Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999) (emphasis in original) (“Section 2254(c) requires only that state prisoners give state courts a *fair* opportunity to act on their claims.”)). To satisfy the exhaustion requirement, a claim must have been raised through one complete round of either direct appeal or collateral proceedings to the highest state court level of review available. See *O’Sullivan*, 526 U.S. at 844-45; *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc). A properly exhausted claim “must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief.” *Woods*, 764 F.3d at 1129 (quoting *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996)). Fair presentation therefore requires a petitioner to present the state courts with both the operative facts and the federal legal theory upon which the claim is based. See *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2004).

B. Claim 2(A)

Claim 2(A) alleges that Kinford’s guilty plea was invalid because trial counsel falsely advised that Kinford could receive a sentence of 10-25 years, instead of a mandatory life sentence with the possibility of parole after 10 years. (ECF No. 84 at 48-49.) Respondents counter that this claim is unexhausted because Kinford’s appellate briefs in the First and Third Post-Conviction Appeals did not allege counsel misadvised Kinford that he would receive a sentence of 10-25 years. (ECF No. 92 at 11-12 (citing ECF Nos. 49-31, 86-7).) Kinford contends that Claim 2(A) is similar to Ground One of the Original Petition concerning the validity of his plea, which this Court found exhausted. (ECF No. 95 at 22-23 (citing (ECF No. 40 at 4-5).) Kinford asserts that Claim 2(A) is simply more precise than the basic factual allegation of Ground One, *i.e.*, Kinford did not understand that his plea carried a mandatory sentence of 10-years to life. (*Id.*)

Kinford misreads the prior exhaustion ruling. The Court held as follows:

In the opening brief on appeal, petitioner’s [federal] counsel argued that the state district court improperly intervened in the plea negotiation process and coerced petitioner to accept the State’s plea offer by advising petitioner of the benefits of the plea agreement, the risk of going to trial, and the severe consequences of a conviction. [ECF No. 49-31 at 13.] Implicit within this

argument is the more basic argument, which petitioner voices in his federal habeas petition, that he did not want to plead guilty to a crime carrying a mandatory life sentence and that the state district judge improperly advised him. Therefore, petitioner's inclusion of these statements within Ground [One] does not render the claim unexhausted.

(ECF No. 40 at 5.) Nothing in the Court's ruling addressed the central allegation of Claim 2A, which is that Kinford's guilty plea was invalid because trial counsel rendered false advice. That allegation was not presented to the Nevada Supreme Court, although Kinford could have raised it.¹² In relevant part, Kinford's appellate brief in the First Post-Conviction Appeal alleged that (i) the judge improperly advised Kinford and coerced Kinford into taking the plea,¹³ and (ii) trial counsel was ineffective for allowing and encouraging the entry of a coerced guilty plea. (ECF No. 49-31.) Additionally, Kinford's appellate brief in the Third Post-Conviction Appeal only addressed the Conflict IAC Claim. (ECF No. 86-7.) Because the operative facts and legal theory of Claim 2(A) were never presented to the Nevada Supreme Court, the claim is unexhausted. *See Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (stating that a petitioner "must fairly present his [or her] claim in each appropriate state court," including a state supreme court).

C. Claim 4

Claim 4 alleges that Kinford's appellate attorney was ineffective for advising Kinford to abandon his direct appeal, thus depriving Kinford of the ability to raise meritorious claims (*i.e.*, Claims 2(A), 2(B), and 2(C) regarding the validity of his guilty plea). (ECF No. 84 at 60-62.) Respondents argue that, although Kinford raised an

¹²Ground IV of the First State Petition presented an IAC claim based on trial counsel's failure to advise Kinford with correct information regarding the potential sentence or move to withdraw the guilty plea, which was based on trial counsel's erroneous information. (ECF No. 48-55 at 14.) However, Kinford did not raise this claim in the First Post-Conviction Appeal. (See ECF No. 49-31.)

¹³This is referred to as a "*Cripps* violation" under Nevada case law. *See Cripps v. State*, 122 Nev. 764, 770-71 (2006) (adopting a bright-line prohibition against any judicial participation in plea negotiations with "one narrow, limited exception: the judge may indicate on the record whether the judge is inclined to follow a particular sentencing recommendation of the parties. Any other comments or discussion by the judge relating to a potential plea must be strictly avoided.")

1 appellate-level IAC claim in the First Post-Conviction Appeal, the allegations were limited
 2 to appellate attorney's failure to raise the purported *Cripps* violation, Claim 2(B)—not
 3 Claims 2(A) or 2(C). (ECF No. 92 at 12-13.) Kinford counters that his appellate brief set
 4 forth allegations beyond the *Cripps* violation, such as his brain injury and medication,
 5 attempts to withdraw his plea before sentencing, and misunderstanding of the sentence
 6 (ECF No. 95 at 23 (citing ECF No. 49-31 at 3-6, 8, 10-11).) Because the brief recounted
 7 facts beyond the *Cripps* violation, Kinford argues the gravamen of Claim 4 was fairly
 8 presented to the state courts. (*Id.*)

9 The Court finds Claim 4 is unexhausted. "Generally, a petitioner satisfies the
 10 exhaustion requirement if he [or she] properly pursues a claim (1) throughout the entire
 11 direct appellate process of the state, or (2) *throughout one entire judicial postconviction*
 12 *process* available in the state." *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004)
 13 (emphasis added and omitted) (quoting Liebman & Hertz, *Federal Habeas Corpus*
 14 *Practice and Procedure*, § 23.3b (4th ed. 1998)). Here, the Nevada Supreme Court
 15 expressly declined to address Kinford's appellate IAC claim because he failed to raise it
 16 before the state court: "Kinford argues that appellate counsel was ineffective for failing to
 17 recognize appealable issues and therefore incorrectly advising him that he had no basis
 18 to lodge a direct appeal. *As this claim was not raised in his petition below, we decline to*
 19 *address it on appeal.*" (ECF No. 49-41 at 5 (emphasis added).) Because Kinford raised
 20 an appellate IAC claim for the first and only time in the First Post-Conviction Appeal,
 21 Kinford did not fairly present such claim throughout one entire round of post-conviction
 22 process in Nevada courts, so as to exhaust state remedies for purposes of federal habeas
 23 review. As such, Claim 4 is unexhausted in its entirety.

24 **D. Claims 2, 3, and 4**

25 Claims 2, 3, and 4 each state, "Kinford hereby incorporates all prior claims in the
 26 petition." (ECF No. 84 at 47, 54, 60.) Respondents' Motion argues in passing that
 27 Kinford's "incorporation of unexhausted grounds render Claims 2, 3 and 4 unexhausted."
 28 (ECF No. 92 at 13.) Kinford opposes this conclusion. (ECF No. 95 at 24.) Respondents'

1 Reply does not reassert the incorporation argument. (ECF No. 103 at 10-14.) As
 2 previously noted, Respondents' Motion does not specifically challenge Claims 2(B), 2(C),
 3 or 3(C), and the Court has now determined that Claims 2(A) and 4 are unexhausted for
 4 reasons other than incorporation of prior claims. Respondents provide no legal authority
 5 to support this particular argument. The Court finds that Kinford's incorporation of all prior
 6 claims, in and of itself, did not render Claims 2, 3, and 4 unexhausted.

7 **VI. PROCEDURAL BARS**

8 Respondents assert that Claims 1, 2(A), 3(A), 3(B), 3(D), and 3(E) are procedurally
 9 barred. (ECF No. 92 at 14-16.) In addition, Respondents ask the Court to apply Nevada's
 10 procedural bars to any claim found unexhausted. (*Id.* at 14.) Because the Court has now
 11 determined Claim 4 is unexhausted, Claim 4 is included in the procedural bar analysis.

12 **A. Governing Law**

13 Where the state courts deny a habeas claim on independent and adequate state
 14 law grounds, that claim is "procedurally defaulted" for purposes of federal habeas review.
 15 *Edwards v. Carpenter*, 529 U.S. 446, 454-55 (2000). Nevada's one-year statute of
 16 limitation for post-conviction petitions, NRS 34.726, and prohibition on second or
 17 successive post-conviction petitions, NRS 34.810(2), are independent and adequate
 18 state procedural rules as applied to non-capital cases. *See, e.g., Williams v. Filson*, 908
 19 F.3d 546, 580 (9th Cir. 2018); *Bargas v. Burns*, 179 F.3d 1207, 1211-14 (9th Cir. 1999).
 20 Additionally, a federal court may consider a claim procedurally defaulted where "it is clear
 21 that the state court would hold the claim procedurally barred." *Sandgathe v. Maass*, 314
 22 F.3d 371, 376 (9th Cir. 2002) (quoting *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir.
 23 2002)). When a claim is procedurally defaulted, federal review is barred unless the
 24 petitioner "can demonstrate cause for the default and actual prejudice as a result of the
 25 alleged violation of federal law." *Coleman*, 501 U.S. at 724.

26 **B. Claims 1 and 3(A)**

27 Claim 1 alleges an IAC claim based on trial counsel's undisclosed conflicts of
 28 interest, which adversely affected counsel's representation of Kinford. (ECF No. 84 at 19-

47.) Claim 3(A) raises an IAC claim for counsel's failure to effectively investigate the case or advise Kinford about his potential defense. (*Id.* at 54-56.) The statement of exhaustion for the Second Amended Petition states that "Kinford exhausted Claims 1 and 3(A) on his return to state court."¹⁴ (*Id.* at 18.) These claims were presented to the state court for the first time in the Third State Petition. (ECF No. 85-7 at 10-21, 26-27). The claims were then dismissed and affirmed as procedurally barred. (ECF No. 86-10.) Thus, Claims 1 and 3(A) were procedurally defaulted in Nevada's courts on independent and adequate state law grounds.

C. Claims 2(A) and 4

Claims 2(A) and 4 are unexhausted. A federal court need not dismiss a claim on exhaustion grounds if it is clear the state court would find the claim procedurally barred under state law. See *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014) (en banc) ("An unexhausted claim will be procedurally defaulted, if state procedural rules would now bar the petitioner from bringing the claim in state court."). Here, the state court would—and *did* in fact—find Claims 2(A) and 4 procedurally barred under Nevada law when Kinford presented the claims to the state court as grounds 2(A) and 4 of the Third State Petition. (ECF No. 85-7 at 21-22, 30-31.) The state court dismissed grounds 2(A) and 4 as procedurally barred under NRS § 34.726, NRS § 34.745(4), and NRS § 34.810. (ECF No. 85-16.) Kinford did not appeal the state court's ruling as to grounds 2(A) and 4 of the Third State Petition. The Court therefore finds that Claims 2(A) and 4 are now procedurally defaulted.

D. Claims 3(B), 3(D), and 3(E)

Claim 3 presents IAC allegations based on Kinford's plea and inability to withdraw his plea. (ECF No. 84 at 54-59.) Claim 3(B) alleges that trial counsel grossly misadvised Kinford about the consequences of his plea and a potential trial. (*Id.* at 56). Claim 3(D)

¹⁴The First Amended Petition stated, "Grounds One and Ground 3(A) are not exhausted, as they is [*sic*] based on new information concerning conflicts of interest by Kinford's attorneys that were not previously revealed, and that were discovered for the first time during appointed federal counsel's investigation." (ECF No. 47 at 10.)

1 alleges trial counsel failed to ensure that Kinford entered a voluntary plea given the health
 2 issues counsel knew about or should have known about. (*Id.* at 57-58.)¹⁵ Claim 3(E)
 3 alleges that trial counsel deprived Kinford of the opportunity to seek withdrawal of his plea
 4 before sentencing. (*Id.* at 58-59.) Kinford alleges that these three IAC claims are similar
 5 to Ground Two of the Original Petition, which the Court has already found to be
 6 exhausted. (*Id.* at 19 (citing ECF No. 40 at 6).)

7 Respondents assert that Claims 3(B), 3(D), and 3(E) are procedurally defaulted
 8 because Kinford presented the claims in the Second and Third State Petitions, and both
 9 state petitions were dismissed in Nevada's courts on independent and adequate state
 10 law grounds. (ECF No. 92 at 15-16.)

11 **1. Claim 3(B)**

12 Kinford argues that Claim 3(B) is not defaulted because it was presented to the
 13 Nevada Supreme Court in the First Post-Conviction Appeal. (ECF No. 95 at 27.) In
 14 particular, Kinford contends that Claims 3(B) and 2(A) are based on essentially the same
 15 facts—*i.e.*, Kinford did not understand the consequences of his plea because his attorney
 16 misadvised him—and both claims were presented in the First Post-Conviction Appeal.
 17 However, Kinford is incorrect. As previously addressed, Claim 2(A) is both unexhausted
 18 and now procedurally defaulted because it was not presented to the Nevada Supreme
 19 Court in the First Post-Conviction Appeal. The same is true of Claim 3(B) as it is based
 20 on essentially the same facts, and thus Claim 3(B) is unexhausted and procedurally
 21 defaulted.

22 **2. Claim 3(D)**

23 Kinford also contends that Claim 3(D) is not defaulted because a trial-level IAC
 24 claim was fairly presented in the First Post-Conviction Appeal with a thorough description
 25 of his health issues. (*Id.* at 28.) The Court agrees. Although Kinford's appellate brief
 26

27 ¹⁵Claim 3(D) incorporates the allegations set forth in Claim 2(C). (ECF No. 84 at
 28 57.) The Motion does not specifically challenge Claim 2(C), which alleges that Kinford's
 medical issues prevented him from understanding the plea.

discussed the purported *Cripps* violation, it also provided significant details regarding Kinford's traumatic brain injury, memory problems, heavy medications, multiple and conflicting competency evaluations, diagnoses of multiple mental illnesses, request to withdraw the plea before sentencing, and counsel's acknowledgment of Kinford's "organic brain condition." (ECF No. 49-31 at 6-9, 11.) Kinford cited the controlling United States Supreme Court authority for evaluating defense counsel's performance in the plea-bargaining context (*Id.* at 15 (citing *Hill v. Lockhart*, 474 U.S. 52 (1985))), and Kinford's central IAC allegation—trial counsel allowing and encouraging the entry of a coerced guilty plea—was broad enough to encompass his health issues. (*Id.* at 16.) As such, the Nevada Supreme Court was afforded a sufficient opportunity to hear Kinford's contention that his trial counsel failed to ensure that he entered a voluntary plea given his health issues. The Court therefore concludes that Claim 3(D) was fairly presented to the Nevada courts and is not procedurally defaulted.

3. Claim 3(E)

Finally, Respondents assert that Claim 3(E) is defaulted because the appellate brief in the First Post-Conviction Appeal did not allege that Kinford's trial counsel failed to seek withdrawal of the guilty plea. (ECF No. 92 at 15-16.) Relying on the Court's prior exhaustion ruling (ECF No. 40), Kinford contends that Claim 3(E) was presented because Ground Two of the Original Petition alleged that Kinford's guilty plea resulted from counsel's ineffectiveness "during the entire plea process." (ECF No. 95 at 28-29 (citing ECF No. 10 at 15).)¹⁶

The record reveals that Claim 3(E) is in fact defaulted. Ground IV of the First State Petition presented an IAC claim based on counsel's failure to advise Kinford with correct information regarding the potential sentence or move to withdraw the guilty plea, which

¹⁶Kinford also asserts that because the Motion does not specifically argue Claim 3(E) is unexhausted, the argument is waived. (ECF No. 95 at 28 n.87.) Kinford is correct that Respondents did not include Claim 3(E) in the section of their Motion addressing exhaustion alone. (ECF No. 92 at 10-13.) However, Respondents addressed the exhaustion of Claim 3(E) as part of their procedural bar argument. (*Id.* at 15-16.)

1 was based on counsel's erroneous information. (ECF No. 48-55 at 14.) However, Kinford
 2 abandoned Ground IV of the First State Petition in the First Post-Conviction Appeal. (See
 3 ECF No. 49-31.) Because Ground IV was abandoned on appeal, the operative facts and
 4 legal theory of Claim 3(E) were not raised before the Nevada Supreme Court, and Claim
 5 3(E) is now unexhausted and defaulted. See *Baldwin*, 541 U.S. at 29.

6 In sum, the Court finds that Claims 1, 2(A), 3(A), 3(B), 3(E), and 4 are procedurally
 7 defaulted. Thus, federal review is barred unless Kinford can demonstrate cause and
 8 prejudice to overcome the default. However, Claim 3(D) is not defaulted and Respondents
 9 will be instructed to answer this claim on its merits.

10 **VII. CAUSE AND PREJUDICE TO OVERCOME THE DEFAULTS**

11 When an incarcerated individual "procedurally defaults" a federal claim, judicial
 12 review is barred unless he or she can show either: (1) "cause for the default and actual
 13 prejudice as a result of the alleged violation of federal law," or (2) "that failure to consider
 14 the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 724.
 15 To demonstrate cause, a petitioner must show that some external and objective factor
 16 impeded his or her efforts to comply with the state's procedural rule. See *Maples v.*
 17 *Thomas*, 565 U.S. 266, 280-81 (2012). Ignorance or inadvertence does not constitute
 18 cause. See *Murray v. Carrier*, 477 U.S. 478, 486-87 (1986). To show prejudice, a
 19 petitioner bears the burden of showing not merely that the error created a possibility of
 20 prejudice, but that the error worked to his or her actual and substantial disadvantage,
 21 infecting the entire proceeding with constitutional error. *Id.* at 494; *Bradford v. Davis*, 923
 22 F.3d 599, 613 (9th Cir. 2019).

23 Kinford argues he can show cause and prejudice to overcome any default based
 24 on the ineffective assistance of his appellate and post-conviction counsel.

25 **A. IAC of Appellate Counsel – Claim 2(A)**

26 In certain circumstances, counsel's ineffectiveness in failing properly to preserve
 27 a habeas claim for review in state court will suffice to show cause. See *Edwards*, 529
 28 U.S. at 451 (citing *Murray*, 477 U.S. at 488-89). The ineffective assistance of appellate

1 counsel in failing to raise a claim on direct appeal in the state criminal proceedings may
 2 potentially establish cause and prejudice. See *Cockett v. Ray*, 333 F.3d 938, 943-44 (9th
 3 Cir. 2003). “But to assert such an excuse in a federal habeas petition, a state prisoner
 4 must first exhaust in state court the claim that his [or her] appellate counsel was
 5 constitutionally inadequate.” *Arrendondo v. Neven*, 763 F.3d 1122, 1140 (9th Cir. 2014).

6 Here, Kinford seeks to excuse the procedural default of Claim 2(A) based on
 7 alleged constitutional violations by appellate counsel, Jacob Sommer. (ECF No. 95 at 29-
 8 30.) However, Kinford failed to present the corresponding appellate IAC claim—Claim 4—
 9 to the state court in his First State Petition, and that claim is itself unexhausted and
 10 procedurally defaulted. As such, Kinford may not successfully rely upon Claim 4 to
 11 establish cause excusing the procedural default of Claim 2(A).

12 **B. IAC of Post-Conviction Counsel**

13 “Generally, post-conviction counsel’s ineffectiveness does not qualify as cause to
 14 excuse a procedural default.” *Ramirez v. Ryan*, 937 F.3d 1230, 1241 (9th Cir. 2019) (citing
 15 *Coleman*, 501 U.S. at 754-55). However, in *Martinez v. Ryan*, 566 U.S. 1 (2012), the
 16 United States Supreme Court created a narrow exception to the general rule that errors
 17 of post-conviction counsel cannot provide cause for a procedural default. *Id.* at 16-17.
 18 “Under *Martinez*, the procedural default of a substantial claim of ineffective assistance of
 19 trial counsel is excused if state law requires that all claims be brought in the initial
 20 collateral review proceeding . . . and if in that proceeding there was no counsel or counsel
 21 was ineffective.”¹⁷ *Ramirez*, 937 F.3d at 1241 (citing *Martinez*, 566 U.S. at 17). But the
 22 *Martinez* exception cannot excuse procedural defaults for substantive claims of trial-court
 23

24 ¹⁷The parties do not dispute that (i) a Nevada post-conviction petition in a state
 25 district court is an initial-review collateral proceeding for purposes of *Martinez*, and (ii)
 26 Nevada law requires an incarcerated individual to present a trial-level IAC claim in his or
 27 her first post-conviction petition for purposes of applying the *Martinez* rule. With these
 28 prerequisites satisfied, the Court proceeds to *Martinez*’s additional requirements. See,
 e.g., *Rodney v. Filson*, 916 F.3d 1254, 1259-60 (9th Cir. 2019) (discussing procedural
 default and *Martinez*’s requirements, as applied in the Nevada context).

1 error, appellate-level IAC claims, or “attorney errors in other kinds of proceedings,
 2 including appeals from initial-review collateral proceedings, second or successive
 3 collateral proceedings, and petitions for discretionary review in a State’s appellate courts.”
 4 *Martinez*, 566 U.S. at 16-7; *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017).

5 To establish cause and prejudice for a trial-level IAC claim under *Martinez*, a
 6 petitioner must show that:

7 (1) post-conviction counsel performed deficiently; (2) there was a
 8 reasonable probability that, absent the deficient performance, the result of
 9 the post-conviction proceedings would have been different, and (3) the
 10 underlying ineffective-assistance-of-trial-counsel claim is a substantial one,
 which is to say that the prisoner must demonstrate that the claim has some
 merit.

11 *Ramirez*, 937 F.3d at 1242 (internal quotations omitted). The *Martinez* test relies on
 12 *Strickland v. Washington*, 466 U.S. 668 (1984),¹⁸ for its first and second “cause” prongs.
 13 *Id.* at 1241. Notably, a federal district court’s determination of the second prong—whether
 14 there was a reasonable probability that the result of the post-conviction proceedings
 15 would be different—“is necessarily connected to the strength of the argument that trial
 16 counsel’s assistance was ineffective.” *Id.* (quoting *Clabourne v. Ryan*, 745 F.3d 362, 377
 17 (9th Cir. 2014) (“The prejudice at issue is prejudice at the post-conviction relief level, but
 18 if the claim of ineffective assistance of trial counsel is implausible, then there could not be
 19 a reasonable probability that the result of post-conviction proceedings would have been
 20 different.”), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798, 819 (9th Cir.

21
 22 ¹⁸The two-element *Strickland* test for IAC claims requires a petitioner to show that
 23 (1) “counsel’s representation fell below an objective standard of reasonableness,” and
 24 (2) “any such deficiency was ‘prejudicial to the defense’.” *Garza v. Idaho*, 139 S. Ct. 738,
 25 743-44 (2019) (quoting *Strickland*, 466 U.S. at 687–88, 692). The court must apply a
 26 “strong presumption that counsel’s conduct falls within the wide range of reasonable
 27 professional assistance.” *Strickland*, 466 U.S. at 687-688, 692. The petitioner bears the
 28 burden of showing “that counsel made errors so serious that counsel was not functioning
 as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. To
 establish prejudice, counsel’s errors must be “so serious as to deprive the defendant of a
 fair trial, a trial whose result is reliable.” *Id.* It is not enough for the petitioner “to show that
 the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693.

2015) (en banc)). The third “prejudice” prong directs courts to assess the merits of the underlying trial-level IAC claim. *Ramirez*, 937 F.3d at 1241. A procedural default will not be excused if the underlying IAC claim “is insubstantial,” *i.e.*, it lacks merit or is “wholly without factual support.” *Id.* (quoting *Martinez*, 566 U.S. at 14-16).

Kinford advances *Martinez* as the basis for excusing the default of Claims 1, 3(A), 3(B), and 3(E),¹⁹ and maintains that Kinford is prejudiced by the defaults. (ECF No. 95 at 30-34.) Respondents request that their *Martinez* analysis be deferred to the answer. (ECF No. 103 at 19.) Respondents provided no substantive response to Kinford’s cause-and-prejudice arguments.

4. Claims 1 and 3(A)

Claims 1 and 3(A) allege that trial counsel’s conflicts adversely affected their representation of Kinford, including by failing to effectively investigate the case or advise Kinford about his potential defense. (ECF No. 84 at 19–47, 55–56.) Kinford’s opposition alleges that post-conviction counsel Robert Fry’s failure to investigate and uncover the conflicts was also ineffective since the factual basis for these claims was apparent in the state court’s docket. (ECF No. 95 at 32-34.) Federal counsel discovered the conflicts upon obtaining the docket sheet in July 2014 and, within months, filed the First Amended Petition and Third State Petition alleging Claims 1 and 3(A) for the first time.

The Court finds that the cause-and-prejudice analysis of Claims 1 and 3(A) is necessarily connected to the merits of the claims themselves and will defer a determination on both questions until a merits determination. The Motion is therefore denied without prejudice as to those grounds. Respondents may renew their procedural default arguments in the answer.

5. Claims 3(B) and 3(E)

Kinford asserts that he can satisfy the *Martinez* test for Claim 3(B) (misadvice

¹⁹Kinford also asks the Court to apply *Martinez* to excuse the default of Claim 2(A); however, *Davila* squarely precludes application of the narrow *Martinez* exception to appellate-level IAC claims. See *Davila*, 137 S. Ct. at 2064.

1 about plea consequences) and Claim 3(E) (failing to move for plea withdrawal before
 2 sentencing) based on Fry's failure to present any witnesses or evidence at the June 2010
 3 evidentiary hearing for the First State Petition. Fry's failure to do so, Kinford contends,
 4 could not have been justified by any tactical or strategic reason. (ECF No. 95 at 32-33.)
 5 As to Claim 3(E), Kinford argues that Fry "could have presented a more precise claim in
 6 support of the motion to withdraw" the guilty plea and pointed out "the more liberal
 7 standard that would have applied to a pre-sentencing motion." (*Id.* at 33.)

8 The *Martinez* exception does not apply to Claims 3(B) and 3(E). As explained in
 9 Section V.D., *supra*, Claims 3(B) and 3(E) are unexhausted, and now procedurally
 10 defaulted, because they were presented in the First State Petition but not presented in
 11 the First Post-Conviction Appeal. The omission caused the lack of exhaustion and
 12 resulting default. However, Fry no longer represented Kinford on appeal—post-conviction
 13 appellate attorney Erik Johnson represented Kinder in the First Post-Conviction Appeal.
 14 (See ECF No. 49-31.) Thus, Fry did not prevent Kinford from raising these claims on
 15 appeal. Accordingly, Fry's performance with regard to the First State Petition—ineffective
 16 or not—did not deprive Kinford of the opportunity to raise claims on appeal. The errors of
 17 post-conviction appellate counsel are outside the scope of the *Martinez* exception. See
 18 *Martinez*, 566 U.S. at 16 ("The holding in this case does not concern attorney errors in
 19 other kinds of proceedings, including appeals from initial-review collateral proceedings").
 20 Because *Martinez* cannot supply cause for the procedural default of Claims 3(B) and 3(E),
 21 these claims must be dismissed as procedurally defaulted.

22 **VIII. CONCLUSION**

23 In accordance with the foregoing, it is therefore ordered that Respondents' Motion
 24 to Dismiss (ECF No. 92) is granted in part as follows:

25 A. Claims 1, 2(A), 3(A) 3(B), 3(E), and 4 are procedurally defaulted.

26 B. Consideration of whether Kinford can demonstrate cause and prejudice under
 27 *Martinez v. Ryan*, 566 U.S. 1, to overcome the procedural default of Claims 1
 28 and 3(A) is deferred until the time of merits review.

1 C. Claims 2(A), 3(B), 3(E), and 4 are dismissed with prejudice.

2 It is further ordered that Respondents file an answer to all surviving claims—Claims
3 1, 2(B), 2(C), 3(A), 3(C), and 3(D)—of the Second Amended Petition (ECF No. 84) by
4 January 12, 2021. The answer must include substantive arguments on the merits as to
5 each surviving claim, in addition to raising any procedural defenses authorized by this
6 order. In filing the answer, Respondents must comply with the requirements of Rule 5 of
7 the Rules Governing Section 2254 Cases in the United States District Courts.

8 It is further ordered that Kinford will have 60 days following service of the answer
9 to file and serve a reply brief.

10 DATED THIS 12th Day of November 2020.

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12 _____
13 MIRANDA M. DU
14 CHIEF UNITED STATES DISTRICT JUDGE
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